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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. [redacted] 121

DOROTHY K. KNOST, *Petitioner*,

v.

DONALD A. MACMILLAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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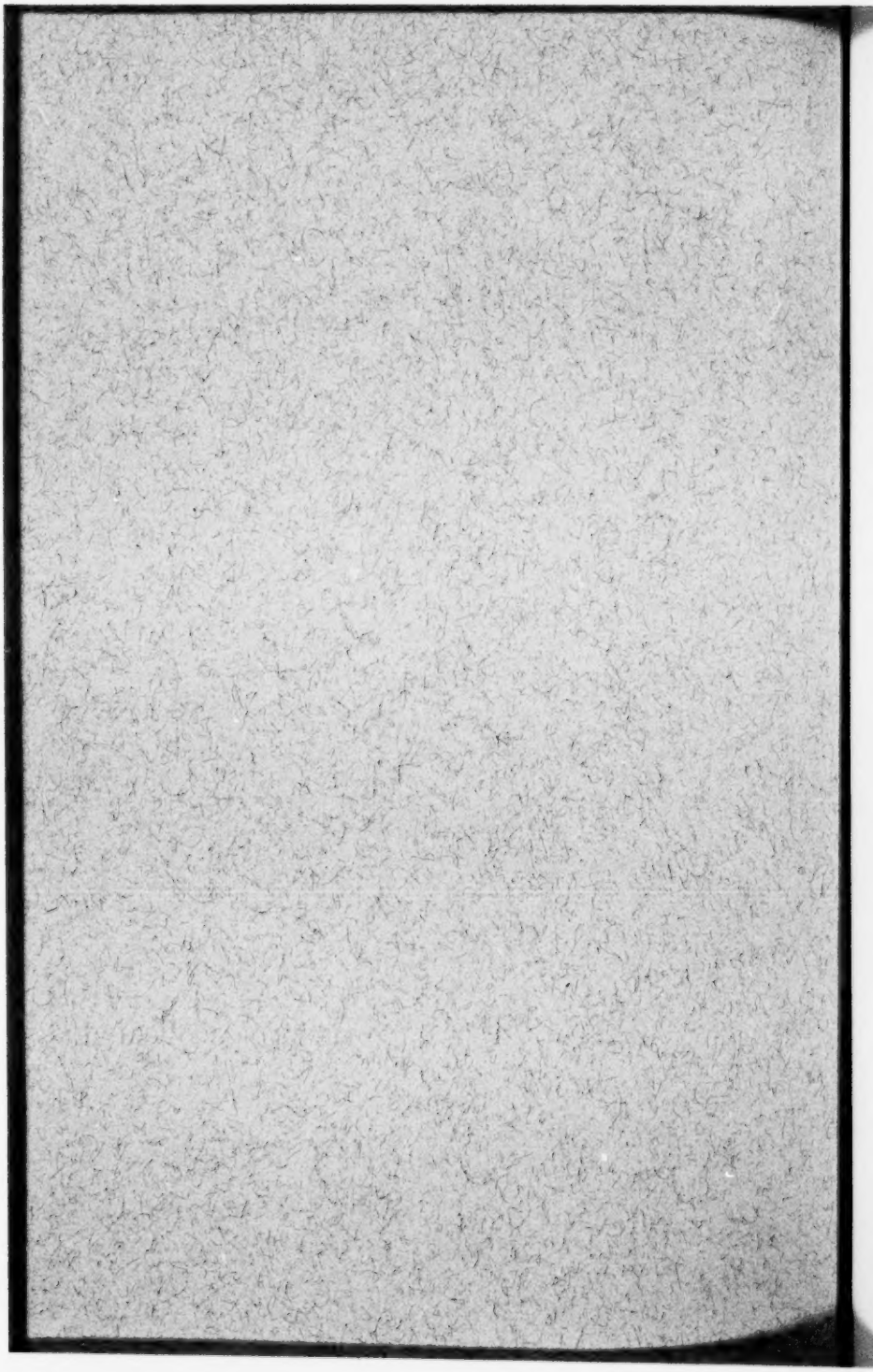

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, the appellee below, prays a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on the 30th day of March, 1942 (R. 530), reversing the judgment of the District Court of the United States for the District of Columbia in refusing to set aside the verdict of the jury.

OPINIONS BELOW.

The Judge of the District Court of the United States for the District of Columbia rendered an opinion refusing to set aside the verdict of the jury and to enter an order for the defendant (appellant below) *non obstante veredicto.* This opinion is set forth in the record at p. 516. The opinion of the United States Court of Appeals for the District of Columbia is found in 126 F. 2d. 235.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on the 30th day of March, 1942 (R. 530).

The jurisdiction of this court is invoked under Section 240A of the Judicial Code, as amended by the Act of February 13, 1935, in 28 U. S. C., Section 347.

QUESTIONS PRESENTED.

This case involves two questions. First, whether the evidence supported the verdict of the jury in finding that the will of the testatrix was obtained by undue influence. Second, whether two justices of the United States Court of Appeals for the District of Columbia (the Chief Justice dissenting) out of the six justices composing the court, are empowered to reverse the judgment of the United States District Court for the District of Columbia refusing to set aside the verdict finding that the will of the testatrix was procured by undue influence. Third, whether even if a minority of the Appellate Court is empowered to reverse the judgment of the court below refusing to set aside the verdict of the jury, finding a will obtained by undue influence, it is not arbitrary and an abuse of judicial discretion to deny the petition for re-hearing and re-argument before the full court where the two justices uniting in the opinion overturning the verdict of the jury (the Chief Justice dis-

senting) declared: "Appellant's conduct may arouse distaste in reasonable men. Reasonable men measuring his conduct by their individual standards may even call it improper. The jury in effect have done so."

REASONS FOR GRANTING THE WRIT.

A writ of certiorari should be granted under subdivision 5(b) of rule 38 of this court for the following reasons:

1. The two judges of the United States Court of Appeals for the District of Columbia in overruling the verdict of the jury of twelve men, set themselves up as a jury of the facts superior to the jury which heard the evidence and saw the witnesses, and has thus deprived the petitioner of the right of trial by jury on an issue of fact in violation of the Seventh Amendment of the Constitution of the United States.

2. The decision of the Appellate Court is in conflict with decisions of this court that a motion to set aside a verdict "could be granted only when all reasonable men draw but one conclusion from it and that utterly opposed to the plaintiff's right to recover."

3. Two judges of the United States District Court for the District of Columbia who heard the evidence and saw the witnesses, refused to direct verdicts for the respondent. The Chief Justice of the United States Court of Appeals was of opinion that there was evidence to support the verdict of the jury. The petitioner filed a petition before the Court of Appeals asking for a rehearing and a re-argument before the full court. This was denied.

Thus two judges of the Appellate Court who did not hear the evidence or see the witnesses have set aside the verdict of the jury where three other judges thought the evidence supported the verdict. It is in the public interest to have an authoritative determination of (a) whether or not two judges of a court composed of six judges are empowered under the law to set aside the verdict of the jury and the

action of the court below, and (b) whether or not it is not arbitrary and a violation of judicial discretion to refuse a re-hearing and re-argument under such circumstances.

STATEMENT OF THE CASE.

The District Court of the United States for the District of Columbia, upon a verdict of the jury finding that the will of Nellie E. Cameron was obtained by undue influence, entered an order denying its probate. The testatrix died while visiting in California. She had lived at 440 Park Road, Washington, D. C. for more than 23 years prior to her death (R. 48). The testatrix drove to California alone with the respondent, McMillan, in five days arriving there October 27, 1937. The will in question was executed within a day or two after her arrival in California. She left her home with the telephone connected, the oil tanks filled, ready for occupancy under the care of her neighbor (R. 50, 164). She had two lots in Cedar Hill Cemetery in the District of Columbia where she expected to be buried (R. 50). Her estate amounted to approximately $29,000 (R. 210). She was taken ill in December 1937 and died February 3, 1938. The respondent, McMillan, on the day after her death and the day before her burial, the sole beneficiary of her will, filed it for probate in California and sought letters testamentary falsely swearing that she was domiciled in California (R. 199, 200) although the will itself gave her domicile at 440 Park Road, Washington, D. C. (R. 1).

The testatrix was more than 76 years old when she died (R. 206). The sole beneficiary was 41 and was no relation to her but was the grandnephew of her husband who died in 1928 and whose estate she inherited (R. 209).

Trial was had in the District of Columbia upon the issue of the testatrix's domicile and a jury rendered a verdict October 21, 1938 that she died domiciled in the District of Columbia (R. 4). The petitioner filed a caveat and two trials were had before the District Court on the issue of undue influence. In the first trial before Mr. Justice

Adkins, the jury disagreed, McMillan, the respondent, filed a petition for special appeal. This petition was denied. In that trial McMillan, the caveatee, moved for a directed verdict at the close of the caveator's case. This was overruled. The motion for a directed verdict was renewed at the conclusion of all the testimony and overruled. After the jury did not agree the caveatee filed a motion for a judgment *non obstante veredicto.* This motion was denied.

In the subsequent trial, motion for directed verdict, for judgments *non obstante veredicto* or for a new trial were filed and denied. Upon an appeal from the judgment of the court refusing to interfere with the verdict of the jury and denying probate of the will, appeal was taken to the United States Court of Appeals for the District of Columbia and the judgment of the lower court was reversed.

Out of the tremendous record consisting of 526 printed pages we will attempt to point out the most salient facts.

Testatrix first will was made on January 28, 1931, leaving her property, with the exception of small individual bequests, to her brother, whom she raised and who in turn had supported her until her marriage, for his life, and at his death to her niece, the appellee, Dorothy Knost (R 75). Dorothy Knost had spent many summers with her for many years and was the peculiar object of her affections (R. 40, 47, 127, 165). In 1933, her brother having died, the testatrix dictated a letter in her lawyer's office directed to her niece Dorothy Knost, expressing the wish that she, Dorothy Knost, should make certain disposition of the estate left her (R. 103). The directions of this letter were followed subsequently on October 3, 1935, by the execution of another will which was drafted by her attorney, Walter B. Guy. Donald MacMillan, according to the testimony of the neighbors of Mrs. Cameron, appeared for the first time in Washington in that neighborhood in October, 1935.

He was of no blood relation to Mrs. Cameron but was a grand nephew of Mrs. Cameron's husband, and is now approximately 41 years of age. At the time he first ap-

peared in 1935 Mrs. Cameron was 73 years of age and he was 37. By the terms of her will of October 3, 1935, Donald MacMillan, was for the first time mentioned, being left $300.00; the rest of her estate, as in her former will, being left to her niece Dorothy Knost (R. 79).

MacMillan came to Washington in October, 1935, and took Mrs. Cameron to many places of amusement and even to night clubs (R. 141). His automobile was always at her door when he was in Washington (R. 319, 320). On December 4, 1935, while Donald MacMillan was still in the District of Columbia and still seeing Mrs. Cameron with frequency, she went to Mr. Guy's office, who had been her attorney ever since her husband died, and again told him that although she was violating her husband's wishes she was going to leave one-half of her residuary estate to MacMillan, and she thereupon executed the will of December 4, 1935 (R. 67). Subsequent to that time and in 1936, MacMillan motored her out to California where she met his family, the MacMillans, and was visited almost daily by them (R. 450, 463, 468). She returned to Washington in June, 1937. MacMillan came back to Washington in the fall of 1937 (R. 417). In October, 1937, Mrs. Cameron visited Mr. Guy, her attorney, and discussed with him her situation fully, even asking if she should pay any attention to the gossip in the neighborhood as to her going around with a younger man (R. 71), making arrangements to sell some stock in order that she could get money to go to California; telling Mr. Guy that Donald MacMillan was here in Washington and that she had bought or contributed to the buying of an automobile in which he was going to drive her out west (R. 70), and that she did not want to take the entire proceeds of the sale of the stock to California with her because she was afraid Donald MacMillan would get it away from her (R. 73). At that time she went over the will of December 4, 1935, and discussed it in detail, paragraph by paragraph, to see if it was the way she wanted it, and said that Donald MacMillan wanted her to leave her entire

estate to him, but since she had left him one-half of her property she would never leave him any more (R. 68, 69, 70, 71). Mr. Guy sold the stock to the extent of about $5300.00, deposited the same to her account and obtained a check from her in the amount of approximately $3,000.00 to be used for the purpose of purchasing such stock as he should select.

Mr. Guy was for years her attorney and adviser and drew all of her wills except the one in California drawn by the doctor brother of the sole beneficiary.

Mrs. Cameron discussed with Mrs. Rogers on this visit the cemetery lots in Cedar Hill Cemetery (R. 50). She drove to California alone with Donald MacMillan in five days, arriving there on October 27, 1937. She was immediately taken to the home of Dr. MacMillan, the draftsman of the will in dispute. There she dined in the bosom of the MacMillan family two days before the will was drafted (R. 27). The making of the new will was discussed at that time (R. 24). Dr. MacMillan, the brother of Donald MacMillan, said he did not want to let her dining with them drag out (R. 28). Dr. MacMillan would not testify whether Donald MacMillan was present or not (R. 28, 29). Donald MacMillan failed to testify that he was not there. In a day or two Mrs. Cameron went to Dr. MacMillan's office, where by chance Gladys Marie Bennett was. She has never been located. The only evidence of any attempt to locate her is a letter and telegrams sent to her in May, 1940 (R. 37, 38, 39, 40, 41, 42). She witnessed the will which was drawn by Dr. MacMillan "in order to save legal expenses," and thereafter typed it in the office of Dr. MacMillan.

The will of November 1, 1937, drafted by the appellant's brother, a doctor, contains this provision:

> "This property of which I may die seized or possessed, is property left to me by my husband. It was his desire that our nephew Donald A. MacMillan receive the estate at my decease."

The will of 1931 made two years after the death of her husband made no mention of any MacMillan (R. 75). The precatory letter of 1933 (R. 103) made no mention of the defendant.

Mrs. Cameron had an attack of shingles in December, 1937 (R. 300), and she wrote her friends here that her condition was such that her doctors advised her that she could not make a trip across the continent by motor again (R. 126). She was attended in her last illness by Dr. MacMillan until she was sent to a nursing home and Dr. Aldrich was called in. She died February 3, 1938, the cause of her death being given as coronary thrombosis, myocarditis, arteriosclerosis, and as a contributing cause ulcers of the left mandible (R. 206). Donald MacMillan wrote her friends two days before her death that she was going to get well (R. 177).

The testatrix died February 3, 1938. Without notice to the caveator or any blood relative the appellant on February 14th applied to the courts of California for letters testamentary, alleging that she was domiciled in California at the time of her death (R. 199, 200). Mrs. Cameron was buried the next day, February 5th. Subsequent to her death it was necessary for the caveator to institute proceedings in the District of Columbia to determine the domicil of the testatrix, in which proceedings Donald MacMillan contested, asserting that Mrs. Cameron was not domiciled in the District of Columbia. A jury in this jurisdiction determined that her domicil was here (R. 4). Thereupon, the caveator, Dorothy Knost, filed the caveat proceedings (R. 9).

The testimony of the caveatee, Donald MacMillan, showed that he had saved all letters which he had received from Mrs. Cameron. It also showed that he had never received a letter from Mr. Cameron (R. 400), and that he had seen his great uncle only three times in his life, once in 1914, once in 1919 and once in 1926 (R. 400). He testified that he was in Washington for the purpose of selling insurance and

falsely said that he had a license as a broker in 1934, but introduced no testimony to show any insurance that he ever sold from 1934 on to the death of Mrs. Cameron. As a matter of fact, the evidence disclosed that he did not have a license until April 17, 1935, and was not licensed to do business in the District of Columbia in 1934 (R. 490). From these letters it is seen that the testatrix wrote the appellant only seven letters in fifteen years until his visit of 1934, and then only courteous replies to his letters. Only one letter was written in 1934, but subsequent to the commencement of his 1934-1935 campaign his telephone calls, letters and visits were continuous and frequent and her replies to him became equally frequent. Further reference will be made to the evidence in the argument to show that the verdict of the jury is fully supported by the testimony.

SPECIFICATION OF ERRORS.

First, the United States Court of Appeals for the District of Columbia erred in reversing the order of the United States District Court which refused probate of the will of Nellie E. Cameron upon verdict of the jury that the same was obtained by undue influence.

Second, the United States Court of Appeals for the District of Columbia erred in not granting the petition of the petitioner for a re-hearing and re-argument of the case before a full court.

ARGUMENT.

I.

The Court of Appeals in reversing the judgment of the trial court refusing to set aside the verdict of the jury, has usurped the function of the jury.

This court in *Berry* v. *United States*, 312 U. S. 450 (decided March 3, 1941) granted a writ of certiorari to determine whether or not the evidence in that case justified a directed verdict. There the jury found that the petitioner

was totally disabled and the Government appealed. The Circuit Court of Appeals upon review held that the plaintiff had not produced sufficient evidence to justify the submission of the cause to the jury. After the writ of certiorari was granted and upon consideration of the evidence, the court reversed the Circuit Court of Appeals on the ground that there was sufficient evidence to sustain the jury's verdict and discussing the new rule authorizing the Circuit Court of Appeals to dismiss a cause instead of remanding for a new trial said:

> "But that rule has not taken away from juries and given to Judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in Courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts;"

In the latest case which has been brought to our attention, decided March 30, 1942, *Jacob* v. *City of New York*, L. Ed. Advance Opinions, Vol. 86, 750, 751, Mr. Justice Murphy in delivering the opinion of the court said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Heretofore we have thought the rule well established in the District of Columbia that when a given state of facts is such that reasonable men may differ on them, the case is for the jury. This court in *Gunning* v. *Cooley*, 281 U. S. 91, affirming and quoting the Court of Appeals for the District of Columbia in *Gunning* v. *Cooley*, 58 Appeals 304, 305, said that the motion to set aside the verdict of the jury "could

be granted only when all reasonable men, 'draw but one conclusion from it and that conclusion utterly opposed to the plaintiff's right to recover.' " This principle has been reaffirmed by the United States Court of Appeals for the District of Columbia in a *per curiam* opinion rendered on the 6th day of April, 1942, in the case of *McWilliams* v. *Shepard* (Not yet reported).

The action of the Appellate Court in reversing the judgment of the District Court is clearly in conflict with these decisions.

If we apply this well established test that the verdict of the jury must stand unless all reasonable men draw a conclusion from it utterly opposed to the plaintiff's right to recover, the conclusion is inescapable that the two justices rendering the decision of the Appellate Court reversing the action of the trial court refusing to set aside the verdict of the jury, have usurped the function of the jury and have deprived the petitioner of her Constitutional right to trial by jury.

It may be that we are unable to appreciate the force of the language used by the court below when it stated frankly that the "Appellant's conduct may arouse distaste in reasonable men. Reasonable men measuring his conduct by their individual standards may even call it improper. The jury in effect have done so."; yet held the evidence did not support a finding that the appellant's conduct was improper according to "commonly accepted standards." Nevertheless, we think it is an irresistible conclusion from this language that all reasonable men would not draw a conclusion therefrom utterly opposed to the plaintiff's right to recover on the ground that the defendant's conduct in obtaining the execution and delivery of the will was improper.

We must assume that all of the judges who participated in this case are reasonable men. Mr. Justice Adkins refused to direct the verdict in the first trial of the case or to find for the respondent notwithstanding the verdict after

the jury disagreed. Mr. Justice Proctor refused to set aside the verdict of the jury, saying (R. 516):

> "If it be true, as argued by counsel for caveatee, that the testimony of no single witness reveals any substantial evidence of undue influence, nevertheless out of the whole mass of evidence there does arise indisputable facts and circumstances from which such inference may reasonably be drawn. An intelligent and attentive jury so found. Notwithstanding the earnest and able arguments of counsel for the caveatee, I can see no just ground for disturbing their verdict. Therefore the motion is denied. The Clerk will enter an order accordingly."

We must assume also that the jury whom Justice Proctor described as "an intelligent and attentive jury" are reasonable men. We also must assume that the Chief Justice of the Appellate Court who was of opinion that the evidence supported the verdict is a reasonable man. When two judges of the District Court and twelve jurors who saw the witnesses and heard the evidence, agreed that the facts were sufficient to support a finding of undue influence (the Chief Justice being of the same opinion), and two justices rendered the opinion who never had had the advantage of seeing the witnesses or hearing the evidence and disagreed with the three judges and the twelve jurors, it can hardly be said that the facts of the case are such that at least all reasonable men draw a conclusion from them utterly opposed to the plaintiff's right to recover.

Therefore, it seems conclusive that the two judges who overruled the verdict of the jury of twelve men and disagreed with the three judges who agreed with the jury, set themselves up as a jury of facts superior to the jury which actually heard the evidence and saw the witnesses, and thus deprived the petitioner of her right of a trial by jury on the issues of fact in violation of the Seventh Amendment to the Constitution of the United States. The tendency of Appellate Courts to usurp the functions of the jury should not be encouraged.

It is true the Appellate Court below after saying that the appellant's conduct might arouse distaste in reasonable men and such men might even call his conduct improper and that the jury had done so, qualifies its statement by saying that the evidence did not support a finding "that appellant's conduct was improper according to commonly accepted standards." We are not given a measuring rod to determine the commonly accepted standards of conduct in a young man's courting and soliciting an aged woman to leave him, an alien to her blood, all her property. The judgment of an intelligent jury who saw the witnesses and heard the testimony should set the standard. If his conduct is deemed "distasteful" by reasonable men, it certainly should not be held to measure up to commonly accepted standards. If such conduct is considered "improper" by reasonable men, certainly it should be considered to be far "below the commonly accepted standards." Even if it is of such doubtful character as to require its propriety to be submitted by two reasonable and learned Judges, who saw and heard the witnesses, to two juries for consideration, the first of which could not agree, but the latter "an intelligent and attentive jury" held such conduct improper, and when the Chief Justice of the Appellate Court, a trial lawyer and a trial Judge of long experience and great ability, concurs with two Justices and the jury below, the question of the propriety of such conduct and its influence on the testatrix is clearly for the jury.

If the "individual standards" of the Chief Justice and the two Judges who tried the case and jury who heard the witnesses are too high to be commonly accepted standards, what is the measure to be applied? The deduction is irresistible that the Appellate Court feels that "the commonly accepted standards" are far below that accepted by the Judges and the jury who found the appellant's conduct improper.

We reassert that it deprives petitioner of her right to jury trial to have two justices of the court below reverse

the verdict of the jury, giving approbation to a course of conduct as not below "commonly accepted standards," which conduct aroused "distaste" in reasonable men and "which reasonable men measuring his conduct by their individual standards may even call improper."

II.

The evidence fully supported the verdict of the jury.

Before analyzing the evidence for the caveator below, we point out some of the facts stated in the opinion of the Appellate Court below fully warranting the submission of the case to the jury. The opinion admits in effect that MacMillan, the respondent herein, carried on a campaign to secure for himself the estate of this woman, alien to his blood, twice his age, but says: "Fortunately for aged widows, though sometimes unfortunately for their next of kin, the law does not penalize such campaigns." The result of this legal conclusion of the court below, if it remains unreversed, is that in the District of Columbia it is an open season and a rich field for gigolos to prey upon aged widows.

As a part of this campaign, the court below points out:

> "In October, 1937, just before the testatrix drove to California with appellant, she told her lawyer that she did not want to carry $5,000 in cash, and was afraid appellant would get it away from her if she did so. She went over her then existing will with the lawyer, and said that appellant had asked her to change it so as to make him sole beneficiary but she would never change it."

The opinion further points out his attentions to the aged testatrix, taking her on long automobile trips including the one to California shortly before she made the will and further said that she made "doting" references to him, reciting the incident when she became violently jealous because a Miss Hammersley went out the door with MacMillan. Why a jealousy of a 76-year-old woman as to a 41-year-old man?

The court did not quote from the record the correspondence between Mrs. Cameron and MacMillan relative to the perfectly innocent incident which made Mrs. Cameron so violently jealous. The record also shows that this jealousy went to such lengths that she made the appellant promise her that he would never see or speak to these people again. For instance, Mrs. Cameron says in her letter of July 28, 1935 (R. 348):

> "Donald, you didn't give the Ex-pretended friend your address, did you? I hope not. *I haven't been near my cousin since you left and that isn't all, only the death of my cousin will take me there,* and I might be the one to go first." (Italics supplied)

The testimony of MacMillan on the same page clearly shows that this reference is to the testatrix' cousin, Mrs. Brashears, and to Miss Hammersley.

Again in the letter of September 5, 1935 (R. 350), Mrs. Cameron wrote the appellant:

> "another promise, please, that you will not see those two that we were kind enough to call on the last Sunday we were together, for I know that if you make this promise you will keep it. You are honorable, of that I am sure. I utterly loath that one person, above everything else I don't want her in my life for any thing. So what say you Donald. I have kept out of her way—*so am sure we can work together, having a different color car we will not be so conspicuous* * * * " (Italics supplied)

What proper conduct on the part of this young man influenced this unnatural change in attitude of the testatrix to her former friend and dying relative, Mrs. Brashears? And why the desire to "not be so conspicuous"?

Every element of undue influence was proven in the case, to wit: (a) the opportunity for exercising undue influence, (b) the result indicating the exercise of undue influence, (c) the testatrix was an easy subject for undue influence and (d) the disposition of the sole beneficiary to exercise

undue influence. In re *Link's Will,* 1930, 202 Wisconsin 1, 231 N. W. 177.

(a) The opportunity for exercising undue influence.

The testatrix made three wills. The will of 1931, made two years after the death of her husband, made no mention of any MacMillan (R. 75). A precatory letter of 1933 (R. 103) made no mention of MacMillan. In 1935 he came to Washington and paid her constant attention. Pierce for the appellant (R. 319) said that his car was at the testatrix' home practically every day and he used to take her out to dinner, just the two of them.

When MacMillan left Washington, May 1934, to go back to California he kept the testatrix posted on his journey (R. 331). She wrote him "I appreciate your calling me almost every evening and the nice drives we had". Why this attention and solicitude for a person whom before 1934 he had seen one day since he was 20 years old?

MacMillan drove Mrs. Cameron in 1935 from Portsmouth, Ohio, to Washington (R. 130). After his return to California, she wrote him (R. 554) that the will she had did not exactly fit the situation and that she had an appointment with her attorney. She thereupon in the first will of 1935 left him $300, although declaring that she was violating her husband's wishes (R. 66). He was back in Washington in October and November 1935, still paying her continuous attention. Thereupon she made the will of December 4, 1935, leaving him one-half of the residue of her property in addition to the $300, again declaring she was violating her husband's wishes (R. 66). These two wills were drafted by Walter B. Guy, a lawyer in the District of Columbia, who testified as follows: (R. 66)

> "Q. In the first will of 1935, Mr. MacMillan was left $300. A. My recollection is that Mr. MacMillan was not mentioned at all in the first will.
>
> Q. 1931? A. The will of 1931.
>
> Q. Yes. A. And that he was made a beneficiary of a specific bequest of $300 at that time, and the explanation was that Mrs. Cameron wanted to do that, although she understood there was some objection—that there

had been some objection in her husband's mind to leaving him anything." (R. 66.)

"Q. Do you recall in that connection you had any discussion with Mrs. Cameron relative to leaving Donald MacMillan any other money? A. Yes, I had a discussion with her at that time, and I discussed that will with her again immediately before she left for California. She had decided at that time to divide the property, as I recall it, equally between her branch of the family, and the various connections of Mr. Cameron, although I still understand she thought it was contrary to Mr. Cameron's wishes."

* * * * * * * * *

"The Witness: At the time of the execution of this particular will, and I am referring to the will of December 4, 1935, I now have no recollection of any discussion with Mrs. Cameron about Donald MacMillan or a bequest to Donald MacMillan, except that she had decided to give him half the residue of the property and give the balance of it to her own relatives, and that her action in that regard she considered somewhat in violation of her husband's wishes."

It must be remembered that the will in question in this case—the will of November 1, 1937, drafted by MacMillan's brother and agreed upon in MacMillan's home, executed upon her arrival in California after he had the sole care, custody and control of this 76-year-old woman on a five-day transcontinental speed test, contained the provision already set out herein, that

"This property of which I may die seized or possessed, is property left to me by my husband. It was his desire that our nephew Donald A. MacMillan receive the estate at my decease."

No attorney was called in to advise the aged testatrix and the will was made for Mrs. Cameron and not by her since it was wholly contrary to her previous declarations and her previous wills where she had declared that her husband did not wish any of his property to go to his family.

From the time Mrs. Cameron went over the will of December 4, 1935, with her attorney and expressed her satisfaction with it to her next door neighbor, she was solely under the care, control and protection of MacMillan until the new will was made in which he was sole beneficiary. Thus MacMillan had every opportunity for exercising undue influence. The will was delivered to him Thanksgiving night after all the family had left, and was in his possession at the time the testatrix died (R. 300).

b. The result indicates the exercise of undue influence.

The most devoted relationship existed between the niece and her aunt, the testatrix, until this young Lochinvar came out of the west. She haid raised her niece's father, who in turn contributed to her support and supported her until her marriage. The will is directly contrary to the disposition of her estate in former wills and directly contrary to her statements made the day before she left Washington. If, as the will declares, she made MacMillan her sole beneficiary because it was the desire of her husband, the natural query is why this granduncle should have selected out of all his relatives this particular grandnephew, and why the testatrix failed to obey her husband's wishes in the wills executed before she came under the influence and domination of the sole beneficiary?

The following facts clearly indicate the exercise of undue influence: (1) the change of the previous wills making more natural disposition of the estate, (2) the wills contrary to her expressed intention made before she left Washington for California, (3) the sudden cutting off of her bequests to her relatives and former friends, even the small bequest to her church, (4) the false statement in the will that it was made according to her husband's wishes, (5) the statement that although MacMillan was the sole beneficiary anyone contesting the will should receive $1.00, making it uniquely certain that the will was made for the testatrix and not by her.

c. The testatrix was an easy subject for undue influence.

She was 76 years of age, physically suffering from diseases obliged to have existed prior to the execution of the will, and the will was executed after a speedy trip across the continent against the advice of her physician that she should not take long automobile trips. MacMillan knew this. (R. 331, 354)

The testatrix was easy to flatter. One of the witnesses for the respondent testified that she could have persuaded her to have left her all of her property (R. 117, 118). She got a first permanent wave to surprise MacMillan and treasured his cigar ashes (R. 191), and was thoroughly jealous of him (R. 185).

(d) The disposition of the sole beneficiary to exercise undue influence.

MacMillan said he came to Washington in 1934 to sell life insurance. This was false because he obtained no license to sell life insurance at that time. He came as a fortune hunter and began unremitting attentions to this aged woman, allowing her to spend money on him and driving her on automobile trips. His disposition is clearly shown by Mrs. Cameron's statement to her attorney that he was trying to get all of her property from her and she was afraid to carry much money to California because he would get it all. His attitude betrays a grasping disposition and his insistence that he be made the sole recipient of her property rather than those to whom she was bound by ties of blood and years of affection. He notified no one of her death and despite the fact that the will itself showed she was domiciled at 440 Park Road, N. W., Washington, D. C. and in the face of letters in his possession showing to the contrary (R. 286) he falsely made oath in order to qualify upon this estate in California that she was a resident in California, and finally he had the will filed for probate even before he buried the testatrix.

In the face of this evidence, it is scarcely to be wondered at that although setting aside the verdict of the jury, the Appellate Court conceded that the conduct of the sole bene-

ficiary "may arouse distaste in reasonable men. Reasonable men measuring his conduct by their individual standards may even call it improper," and makes it certain that the Appellate Court usurped the function of the jury and set itself up as a jury of the facts superior to the twelve men who actually heard the evidence and saw the witnesses

Further than this it is perfectly apparent from the evidence that a confidential relationship existed between the testatrix and the sole beneficiary, raising the presumption of undue influence. It was contended by counsel for the sole beneficiary that the testatrix treated the sole beneficiary "as a mother would a son, and referred to him as 'her Donald'" (R. 445). Whether that relationship was similar to that of mother and son or whether she was infatuated by him, as shown by her school girl letters and the facts heretofore set out, she consulted him about her will (R. 354). He knew who were the beneficiaries in the former will (R. 430, 431). He knew about her cemetery lots. He carried her into her banks and she allowed him to open an account for her, to advise her about her securities and about the renting of her house. She was under his sole care, protection and custody and influence from the time she had expressed to her attorney in Washington her satisfaction with her old will up until the execution of the new will making him sole beneficiary. This confidential relationship, coupled with an unequalled opportunity to exercise undue influence, raises a presumption of undue influence and casts the burden upon the sole beneficiary to overcome this presumption. *Whitelaw* v. *Sims*, 90 Va. 588, 590.

In the Virginia case cited above, it was held that where a will executed by an old man differs from his previously expressed intentions and is made in favor of those who stand in that relationship of confidence or dependence "it raises a violent presumption of fraud and undue influence which should be overcome by satisfactory testimony." The court further said that where a will which runs counter to

the natural wish of the testator that the property should devolve after death on his kin, and settlement is made in favor of one who is so placed to have a controlling power over the testator's mind, it is not unreasonable to require him to show that he did not bring about a result that would have resulted in the normal course of events. See also in re: *Gottschalk's Estate*, June 14, 1940 (Fla.), 196 Southern 844. *Hagerty* v. *Olmstead*, 39 Appeals D. C. 170, 175.

III.

There is no statutory authority for a decision of any case by the Appellate Court below by less than a full court except by stipulation of parties.

The question of whether or not the United States Court of Appeals for the District of Columbia has authority to reverse the action of the lower court by a decision of two out of its six members sitting on a three judge court, has agitated the Bar of the District of Columbia, since the custom was adopted by that court to sit in divisions of three after the increase of the number of judges to six.

The Appellate Court below is the court of last resort in this jurisdiction. It may be fair to point out that the Bar Association of the District of Columbia has registered a protest against this custom and it is greatly in the public interest that the right of this court so to divide and sit in divisions may be authoritatively determined. For this reason and because the decision by the two justices uniting in the majority opinion in the instant case runs counter to the judgment of two judges below and to the judgment of the Chief Justice and is thus a reversal by a minority of the justices who considered the question, we respectfully urge the granting of a writ of certiorari and an authoritative determination of this question of widespread interest to the public and profession.

Upon the hearing in the Appellate Court below, there was no original motion made for a hearing before a full court, but if we are correct in our conclusion that the statutes con-

fer jurisdiction upon only a *full* Appellate Court to determine and decide a case on appeal from the United States Court for the District of Columbia, except by stipulation, this lack of authority is jurisdictional and no motion for a hearing before a full court was necessary. See *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 18.

The authority of the court below to sit as an appellate court to consider the decisions of the District Court must be found in the statutes creating and enlarging the court.

The Act of February 9, 1893 (27th Stat. 434) establishing a Court of Appeals for the District of Columbia, provided that it should consist of one Chief Justice and two Associate Justices. The Act further provided (now Title II, Section 205 of the Code of 1940) that if any member of the court should be absent on account of illness or be disqualified or if for any reason it should be impracticable to obtain a *full* court of three justices, a justice of the District Court of the United States should be chosen to temporarily fill the vacancy or if the parties shall stipulate in writing, such cause might be heard and determined by two justices without calling in any justice of the District Court.

At the time of the increase in the membership of the court, there was no amendment to this organic act providing for a full court to hear and determine cases and no act has been passed since providing that the court might function by a quorum of less than all of the justices. It is so clear that it calls for no construction that the object of the original act was to provide that a full court should hear all cases. This provision was continued in the law when the court was increased to five and a full court now consists of six justices. The only statutory authority to hear and determine appeals from the District Court of the United States for the District of Columbia was conferred upon the "full" court, first of three justices, next of five justices and now of six justices.

In determining the authority of any Federal court to decide any given case we must look to the statute. The Judicial Code, U. S. C. A. Title 28, Sec. 321, provides:

"The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight Associate Justices, *any six of whom shall constitute a quorum.*"

The Judicial Code, U. S. C. A. Title 28, Sec. 243, providing for the United States Court of Claims, consisting of a Chief Justice and four Associate Justices, provides that three of them shall constitute a quorum and that the concurrence of three Judges shall be necessary for the decision of a case. The statutes relative to the Court of Customs and Patent Appeals, U. S. C. A. Title 28, Sec. 301, provides that three members shall constitute a quorum and the concurrence of three members shall be necessary for any decision. In other words, neither in the Court of Claims nor in the Court of Customs and Patent Appeals can two of three Judges comprising the Court render a decision.

Section 117 of the Judicial Code (28 U. S. C. A. Sec. 212) provides that in each circuit the Circuit Court of Appeals shall consist of three Judges, of whom two shall constitute a quorum. Later on Section 118 of the Judicial Code provided for four circuit Judges in the Second, Seventh and Eighth Circuits, two in the Fourth Circuit and three in each of the others, who were made *ex officio* Judges of the Circuit Court of Appeals, and the question arose as to whether the Circuit Court of Appeals in those Circuits having more than three Circuit Judges consisted of all the Circuit Judges or only three of them, and if the latter, which three. This question was recently determined (December 8, 1941) by this Court in *Textile Mills Corp.* v. *Comm. of Int. Rev.*, Advanced Sheets of the United States Supreme Court, Vol. 86, No. 3, p. 242. It was there contended that under Section 117 the Court consisted of only three Judges and that five Judges in that Circuit had no power to sit *en banc*. In determining this question the Court reviewed the statutes and said (p. 246):

> "We cannot conclude, however, that the word 'court' as used in those other provisions of the Judicial Code means only three judges. That would not only produce a most awkward situation; it would on *all* matters disenfranchise some circuit judges against the clear intendment of Sec. 118. Nor can we conclude that the word 'court' means only three judges when the court is sitting, but all the judges when other functions are performed. Certainly there is no specific authority for that construction. And it is difficult to reach that conclusion by inference. For to do so would be to imply that Congress prohibited some circuit judges from participation in the most important function of the 'court' (the hearing and the decision of appeals), though allowing all of them to perform the other functions. Such a prohibition as respects the ordinary responsibilities of a judicial office should be inferred only under compelling necessity, since a court usually will consist of all the judges appointed to it. That necessity is not present here."

In the light of this decision we think it is not too much to say that where the statutory authority conferred upon the United States Court of Appeals for the District of Columbia is conferred upon the *full* court, that this Court should consist of all the Judges appointed to it, who in the absence of specific authority to the contrary, should participate "in the most important function of the 'court' (the hearing and decision of appeals)."

It is significant that when Congress has provided for a quorum of three judges out of a larger number, it has required three to concur in the decision, and if Congress had desired that the Court of Appeals should function by a court of three and a decision by two out of six members, such a provision would have been incorporated in the statute. In the absence of such a provision, with the original statute providing for a determination of any cause by a "full court," it would seem clear that the court has no statutory authority to divide itself into two parts any more than it could divide itself into six parts and have one judge function as a quorum of the court. The six justices function as one court, not two courts nor six.

To quote the language of Mr. Justice Douglas in the *Textile Mills* case, *supra*, "since the court usually will consist of all the judges appointed to it," and since there is no statutory authority for less than all the judges appointed to it sitting as a court and participating in the hearing and decision of appeals, we respectfully urge that the decision below is not the judgment of the Court but is merely the opinion of the two Justices who united in it.*

We submit that in a case involving the fundamental right of jury trial the full court of last resort in this jurisdiction should hear and determine the issue. When the full court hears and determines the case, it obviates the hazard of decision by a minority and "makes for more effectual judicial administration" (*Textile Mills* case, *supra*).

As was said by the Committee on Judiciary of the House, H. R. 1246, 77th Cong. 1st Sess., printed in the note to the Opinion in the *Textile Mills* case, *supra* (P. 247):

> "If the court can sit in banc the situation where two three-judge courts may reach conflicting conclusions is obviated. It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges (there having been a dissent) sets the precedent for the remaining judges. A similar result would be avoided with a court of five judges."

IV.

The refusal of the court below to grant a rehearing and reargument before the full court is arbitrary and a violation of judicial discretion.

When it appeared in the opinion of the court below that a consideration of the record by the judges who wrote the opinion persuaded them that the conduct of the respondent was such as to create distaste in reasonable men and that reasonable men and the jury had in effect called his con-

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* Compare *Gorman et al.* v. *The Washington University*, No. 711, Oct. Term, 1941, decided Apr. 27, 1942.

duct improper in obtaining the will under consideration, we felt that the Appellate Court exercising a sound judicial discretion should grant a rehearing and reargument before the full court. We therefore filed a petition for a rehearing, pointing out that the petitioner should not be left to the hazard of having two out of six judges determine whether or not she was deprived of her right of jury trial by the opinion of the two judges who reversed the judgment of two judges below who deemed the evidence sufficient to submit to the jury and when the Chief Justice was of opinion that the verdict was supported by the evidence. This petition was denied.

Aside therefore from the lack of statutory authority of two judges out of six to reverse the judgment of the courts below and set aside a verdict of the jury on a question of fact, we assert that it was arbitrary and an abuse of judicial discretion to refuse to submit a "right so fundamental and sacred to the citizen" for determination by the full court when a majority of the judges who had considered the case thought the verdict of the jury was sustained by the evidence.

Considering the unusual circumstances arising from the language of the opinion setting aside the verdict of the jury on a question of fact, the division of opinion among the three Appellate judges and the concurring judgment of two trial judges that the evidence was sufficient for submitting the case to the jury, we respectfully submit that the Appellate Court should not have deprived the petitioner of her right of jury trial in the absence of the full court.

On the contrary the court below should have followed the practice and precedent adopted by this court in the *Legal Tender cases*, 12 Wall. 457, 553, overruling *Hepburn* v. *Griswold*, 8 Wall. 603, where this court said of the latter case:

> "That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have

received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. We are not accustomed to hear them in the absence of a *full* court, if it can be avoided." (Italics ours.)

CONCLUSION.

Petitioner therefore prays that a writ of certiorari may issue and upon a review, the judgment of the United States Court of Appeals for the District of Columbia be vacated, reversed and set aside, and the judgment of the District Court for the District of Columbia be affirmed.

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